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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL OSUNA GUERRERO,

Defendant and Appellant.

H041900

(Santa Clara County

Super. Ct. No. C1476320)

Defendant Raul Osuna Guerrero was convicted of forgery (Pen. Code, § 476),¹ identity theft (§ 530.5, subd. (c)(1)), concealing or withholding stolen property (§ 496, subd. (a)), and contempt of court (§ 166, subd. (a)(4)) following a jury trial. The trial court found a “strike” allegation to be true (§§ 667, subds. (b)-(i); 1170.12), which made defendant eligible for sentencing under the Three Strikes law.

Prior to sentencing defendant, the California voters enacted the Safe Neighborhoods and Schools Act (Proposition 47), which went into effect on November 5, 2014. (See Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, Cal. Const., art. II, § 10.) On appeal from the judgment of conviction, defendant argues that the trial court erred by (1) failing to retroactively reduce his forgery conviction to a misdemeanor under section 476 as amended by Proposition 47 and (2) not properly instructing the jury on the charge of concealing or withholding stolen property (§ 496, subd. (a)). Defendant

¹ All further statutory references are to the Penal Code unless otherwise stated.

also asserts that defense counsel provided ineffective assistance by failing to alert the court that it had imposed an unauthorized felony sentence on his forgery conviction.

We find no reversible error and affirm.

I

Procedural History

A second amended information filed against defendant charged him with two misdemeanors and two felonies: a violation of section 530.5, subdivision (c)(1) (obtaining and using personal identifying information of another), a misdemeanor (count 1); a violation of section 496, subdivision (a) (concealing or withholding stolen property), a felony (count 2); a violation of section 166, subdivision (a)(4) (contempt of court), a misdemeanor (count 3); and a violation of section 476 (forgery), a felony (count 4). Counts 1, 2, and 4 were alleged to have occurred on or about February 12, 2014. Count 3 was alleged to have occurred on or about February 14, 2014. A “strike” (a prior robbery conviction) within the meaning of the Three Strikes law was also alleged. (See §§ 667, subs. (b)-(i), 1170.12.)

A jury found defendant guilty of all charges. The trial court found the strike allegation true.

After the voters approved Proposition 47 on November 4, 2014 and before the court sentenced defendant on January 5, 2015, defense counsel filed a written request asking the court to reduce count 4 (forgery under § 476) from a felony to a misdemeanor pursuant to section 17, subdivision (b). The request stated that the offense was for possession of a counterfeit \$50 bill.

At the time of sentencing, the trial court denied the defense request to reduce count 4 to a misdemeanor pursuant to section 17, subdivision (b). The court explained the bases of its decision, namely that defendant stood convicted of multiple violations, he had “a long and virtually uninterrupted history of criminal conduct,” and there was nothing in the circumstances of the offense to justify treating it as a misdemeanor.

The court “recognize[d] that the single check that was made out to the defendant” did not exceed \$950, but that was not “the test” under section 17, subdivision (b). The court also denied defendant’s *Romero* motion (see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504).

The parties and the court agreed that count 2 (§ 496, subd. (a)) had been reduced to a misdemeanor by operation of law under Proposition 47, and the court deemed the offense a misdemeanor. The court sentenced defendant to a four-year term (double the two-year midterm under the Three Strikes law) on count 4 (forgery) and to concurrent two-month terms on counts 1, 2, and 3.

II

Facts

On February 12, 2014, two officers separately responded to a call of a party reporting that her father, defendant, was refusing to leave her apartment. Defendant was placed under arrest for violating a no-contact protective order. During a search of defendant, an officer found a wallet with a marijuana emblem on it in defendant’s jacket and put it in a plastic bag with defendant’s other personal items.

When defendant was booked into Santa Clara County’s jail later that same day, a correctional officer inventoried defendant’s personal property. In defendant’s wallet, the officer found five checks, including a \$400 check, dated February 10, 2014, written on the bank account of St. Thomas More Society of Santa Clara County (STMS), a Catholic organization for judges, lawyers, law professors and law students. The STMS check found in defendant’s possession was made out to a “Raul” with an indecipherable last name beginning with “G”; the signature on the check was illegible. What appears to be defendant’s signature is on the back of the check.

In early February 2014, the society’s financial documents and all of its checks had been taken from a vehicle belonging to Chris Boscia, who was then the society’s treasurer. The treasurer was the person authorized to write checks for the organization.

The STMS check found in defendant's possession was dated after the checks had been taken from Boscia's vehicle, and it had not been signed by Boscia. The payee was not a person to whom the organization had written a check. Defendant did not have a vendor or payee relationship with the society. Defendant was not authorized to be in possession of the check. In mid-March 2014, the society's former treasurer received a call from Bank of America's fraud department, and he was informed that two of the stolen checks had been presented for cashing.

The four other personal checks found in defendant's wallet were from three individuals other than defendant. One of the personal checks appeared to have been made out to "DMV Renewals," but the name of the original payee had been written over. There is an illegible signature on the back. Two of the checks found in defendant's wallet were from the bank account of Alberta Espinoza, who lived in the same apartment complex as defendant's daughter for a period of time in March 2013. One of Espinoza's checks was made out to "daniel Rosbach" in the amount of \$380 and the other check was blank. A fourth personal check, written on the bank account of a third person, was written for \$200 and made payable to "Daniel Rosbach." There are illegible signatures on the back of both checks made payable to Rosbach. Defendant's wallet also contained a counterfeit \$50 bill, a woman's California driver's license, and a State of California benefits identification card in the name of an individual other than defendant.

On November 16, 2013, in a separate incident, an officer searched defendant's wallet, which was found in his right rear pants pocket. The officer found five counterfeit \$20 bills and two counterfeit \$10 bills in the wallet.

On June 2, 2013, in an earlier incident, an officer searched defendant's wallet, which was found in defendant's pocket. The officer found two social security cards that did not belong to defendant in the wallet. The names on the cards were Joseph Mike Ramirez and Enrique Chavez Santos.

When an officer contacted Ramirez by telephone, Ramirez reported that he had lost his social security card. Ramirez told the officer that he did not know defendant and that defendant did not have permission to possess his social security card. The officer also determined, through a database search, that 42 different people had used the social security number appearing on Santos's social security card.

Defendant, who testified in his own behalf, admitted that he had endorsed the STMS check that was found in his wallet on February 12, 2014, and he had planned on depositing it in his own bank account. Defendant also admitted that he had previously been convicted of violating Health and Safety Code section 11359 (possession of marijuana for sale) and second degree robbery.

III

Discussion

A. Count 4

1. Rule of Estrada

Count 4 alleged that defendant violated section 476 (forgery) by having in his "possession with the intent to pass, or to defraud, a fictitious bill, . . . a \$50 bill, purporting to be real currency." Defendant asserts that the trial court imposed an unauthorized sentence on his forgery conviction because, under the rule of *Estrada* (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*)), the conviction automatically became a misdemeanor since he was not yet sentenced when Proposition 47 went into effect on November 5, 2015.

"[The California Supreme Court's] decision in *Estrada* . . . supports an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.]" (*People v. Brown* (2012) 54

Cal.4th 314, 323 (*Brown*); see *People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*).)

“The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.” (*People v. Conley, supra*, at p. 657.)

The *Estrada* court reasoned: “When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.” (*Estrada, supra*, 63 Cal.2d at p. 745.)

“*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule’s application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all *nonfinal judgments*. [Citation.]”² (*Brown, supra*, 54 Cal.4th at p. 324, italics added.) “[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of

² Section 3 states: “No part of it is retroactive, unless expressly so declared.” The Civil Code and the Code of Civil Procedure also contain identical provisions (Civ. Code, § 3; Code Civ. Proc., § 3).

certiorari in the United States Supreme Court has passed. [Citations.]” (*People v. Nasalga* (1996) 12 Cal.4th 784, 790, fn. 5 (*Nasalga*) (plur. opn. of Werdegarr, J.).)

As a general rule, “*Estrada* stands for the proposition that, ‘where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.’” (*Estrada, supra*, 63 Cal.2d at p. 748.)” But, “[t]o ascertain whether a statute should be applied retroactively, legislative intent is the ‘paramount’ consideration” (*Nasalga, supra*, 12 Cal.4th at p. 792 (plur. opn. of Werdegarr, J.).) “Because the *Estrada* rule reflects a presumption about legislative intent, rather than a constitutional command, the Legislature (or here, the electorate) may choose to modify, limit, or entirely forbid retroactive application of ameliorative criminal-law amendments if it so chooses.” (*Conley, supra*, 63 Cal.4th at p. 656.)

In this case, it may be inferred from the text of Proposition 47 and its legislative history that the voters intended (1) the proposition’s ameliorative statutory changes to have circumscribed retroactive effect with respect to those already sentenced before its effective date and (2) those previously sentenced defendants, who were currently serving sentences for felonies that are now misdemeanors under laws enacted or amended by Proposition 47, to seek relief under section 1170.18.³ (See Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, §§ 3, [purpose and intent], 14 [adding § 1170.18], analysis of Proposition 47 by the Legislative Analyst, pp. 35 [measure “allows certain offenders who have been previously convicted of such crimes to apply for reduced

³ An issue concerning retroactivity is currently pending before the Supreme Court in *People v. DeHoyos* (2015) 238 Cal.App.4th 363, review granted Sept. 30, 2015, S228230. That case presents the following issue: “Does the Safe Neighborhood and Schools Act [Proposition 47] (Gen. Elec. (Nov. 4, 2014)), which made specified crimes misdemeanors rather than felonies, apply retroactively to a defendant who was sentenced before the Act’s effective date but whose judgment was not final until after that date?” (<<http://www.courts.ca.gov/documents/OCT0716crimpend.pdf>> [as of Oct. 11, 2016].)

sentences”], 36 [measure “allows offenders currently serving felony sentences for [certain] crimes to apply to have their felony sentences reduced to misdemeanor sentences”; “certain offenders who have already completed a sentence for a felony that the measure changes could apply to the court to have their felony conviction changed to a misdemeanor”].) Section 1170.18 distinguishes between defendants already sentenced for a felony conviction, whether final or not, and defendants yet to be sentenced, who are not covered by its provisions.

Defendant asserts that the voters intended Proposition 47 to apply to qualified defendants yet to be sentenced, and that the *Estrada* presumption applies to that category of defendants, which includes him. “The electorate is presumed to have been aware of *Estrada* and its progeny when they approved Proposition 47. [Citations.]” (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 312; see *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048 [“The voters are presumed to have been aware of existing laws at the time the initiative was enacted. [Citation.]”].) Since there was no savings clause or other textual indication with respect to the category of defendants who committed crimes before the proposition went into effect but who had not yet been sentenced on its effective date, we assume for purposes of this appeal that section 473 as amended by Proposition 47 operates retroactively as to them. We find no basis for concluding that defendant was required to petition for relief under section 1170.18 after being sentenced under the law existing prior to Proposition 47.

We nevertheless determine, as we explain below, that subdivision (b) of section 473 as amended by Proposition 47 did not apply to defendant’s forgery conviction because defendant was “convicted both of forgery and of identity theft, as defined in Section 530.5” (§ 473, subd. (b)). Consequently, the conviction was still punishable as a felony under subdivision (a) of section 473 as amended by Proposition 47.

2. Punishment for Forgery under Section 473 as Amended by Proposition 47

Proposition 47 amended section 473 (Voter Information Guide, Gen. Elec., *supra*,

text of Prop. 47, § 6, p. 71), which sets forth the punishment for forgery. Before the voters approved Proposition 47, forgery was a so-called wobbler, “punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170.” (Stats. 2011, ch. 15, § 360, p. 414 [now § 473, subd. (a)].) Proposition 47 amended section 473 by adding subdivision (b), which provides: “Notwithstanding subdivision (a), any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950), shall be punishable by imprisonment in a county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. *This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.*” (Italics added.) Thus, even after the amendment of section 473 by Proposition 47, a forgery offense not coming within the purview of subdivision (b) of section 473 remains punishable as either a misdemeanor or a felony under subdivision (a) of section 473. (See §§ 16, 17, subd. (a).)

Defendant contends that the last sentence of subdivision (b) of section 473, the language setting forth the “identity theft exception” to application of that subdivision, is ambiguous. He posits three different scenarios in which the identity theft exception to subdivision (b) might apply: (1) where a defendant was convicted of identity theft in a prior case, (2) where a defendant is convicted of both forgery and identity theft in the same case, and (3) where a defendant is convicted of forgery and identity theft based on the same item in the same case. Defendant urges this court to construe the identity theft exception as applying only where the identity theft conviction and the forgery conviction

involve offenses that have a “transactional relationship.” He reasons that a “transactional relationship requirement [would] implement the intent of the voters to limit the scope of the . . . exception to forgery offenses that involve the theft of a victim’s identity.” He maintains that his “identity theft” offense has no transactional relationship to his forgery offense, and therefore the forgery conviction was punishable only as a misdemeanor under section 473, subdivision (b).

“The general principles that govern interpretation of a statute enacted by the Legislature apply also to an initiative measure enacted by the voters. [Citation.] Thus, our primary task here is to ascertain the intent of the electorate [citation] so as to effectuate that intent [citation]. [¶] We look first to the words of the initiative measure, as they generally provide the most reliable indicator of the voters’ intent. [Citations.]” (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 978-979.)

“We begin our task by determining whether the language of the statute is ambiguous. [Citation.] A statutory provision is ambiguous if it is susceptible of two reasonable interpretations. [Citation.]” (*People v. Dieck* (2009) 46 Cal.4th 934, 940.) “Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure (*Burger v. Employees’ Retirement System* (1951) 101 Cal.App.2d 700) and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. [Citation.]” (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543; see *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475 [“In construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language”].)

“When looking to the words of the statute, a court gives the language its usual, ordinary meaning. [Citations.]” (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.) Ordinarily, “[i]f the statutory language is clear and unambiguous our inquiry ends.” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 (*Murphy*).) As

conviction if the defendant was also convicted of identity theft.⁴ We cannot unilaterally insert the narrowing language advocated by defendant in the absence of ambiguity.

We note that, in establishing the identity theft exception, the final sentence of section 473, subdivision (b), uses the present tense, which suggests the relevant action (“is convicted”) must be current. That language must be juxtaposed with the second-to-last sentence of section 473, subdivision (b), which established a separate, disqualifying exception based on certain “prior convictions.” Section 476a, which was also amended by Proposition 47, likewise shows that the drafters knew how to disqualify a defendant from punishment as a misdemeanor based on prior convictions. (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 7, p. 71 [amending § 476a]; § 476a, subd. (b) [“This subdivision shall not be applicable if the defendant has previously been convicted of three or more violations of Section 470, 475, or 476, or of

⁴ In 2006, the Legislature significantly expanded the definition of criminal identity theft under section 530.5. (Stats. 2006, ch. 522, § 2; pp. 3793-3795.) “According to the author [of the 2006 bill amending section 530.5], ‘Since the advent of the information age, identity theft has become one of the most common financial crimes in California and a significant source for illegal purchasing and production of illegal and dangerous drugs. This crime, which victimizes a growing number of Californians every year, can be financial ruinous, yet identity thieves receive a slap on the wrist for all the damage they cause in the lives of these victims. Others states have taken the initiative to enact laws addressing mail theft, a primary source for perpetrating identity theft as well as identity theft trafficking. Moreover, in identity theft cases, victims are often victimized a second time by being asked to travel great distances to testify in far away counties where those cases are prosecuted because our focus on the illegal purchasing of goods, not on the act of identity theft itself. California has a deplorable standing nationwide, ranking in third as the state with the highest number of identity theft victims. It is time that California begin to ratify laws similar to those spearheaded by other states. Protecting residents from these crimes should be a top priority for California. As identity theft and mail theft become rampant crimes, we need to give local law enforcement and the courts the legal authority and tools necessary to aid victims.’ ” (Assem. Floor Analysis, Analysis of Assem. Bill No. 2886 (2005-2006 Reg. Session) as amended Aug. 28, 2006, p. 4.)

this section”].) Defendant concedes that “it appears clear that voters excluded prior identity theft convictions from the scope of the exception.”

Proposition 47 expressly stated that a “purpose and intent of the people of the State of California” was to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession.” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 3, subd. (3), p. 70.) In light of that purpose, it is readily inferable that the drafters and voters considered dual, concurrent convictions of forgery and identity theft to be more serious and to disqualify an offender from automatically receiving more lenient punishment for forgery under section 473, subdivision (b).

Accordingly, we conclude that the identity theft exception to subdivision (b) of section 473 is not ambiguous and it applies where a defendant is concurrently convicted of both forgery and identity theft, as defined in section 530.5. That is what occurred in this case, and those convictions make subdivision (b) of section 473 inapplicable to defendant.

“We may, of course, reject a literal statutory construction where it would result in absurd consequences the Legislature could not have intended. [Citations.]” (*Hudec v. Superior Court* (2015) 60 Cal.4th 815, 828.) But defendant has not demonstrated that giving the language of the identity theft exception its usual, ordinary meaning leads to an absurd result.

Defendant seems to argue that the uncoded provisions of Proposition 47 support his proposed statutory interpretation of the identity theft exception to subdivision (b) of section 473. He points to Proposition 47’s provisions that require the proposition to “be broadly construed to accomplish its purposes” (Voter Information Guide, Gen. Elec. *supra*, text of Prop. 47, § 15, p. 74) and to “be liberally construed to effectuate its purposes” (*Id.*, § 18, p. 74). He also mentions that one of the proposition’s purposes was to reduce state expenditures on nonserious, nonviolent offenses and reduce the state’s prison population. (See *id.*, §§ 2, p. 70 [“The people enact the Safe Neighborhoods and

Schools Act to ensure that prison spending is focused on violent and serious offenses”], 3, subd. (6) p. 70 [“This measure will save significant state corrections dollars on an annual basis.”].) None of these uncodified provisions render the language of the identity theft exception ambiguous.

“As a rule, a command that a constitutional provision or a statute be liberally construed ‘does not license either enlargement or restriction of its evident meaning’ (*People v. Cruz* (1974) 12 Cal.3d 562, 566).” (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 844.) “A liberal [or broad] construction mandate affects statutory construction only when the statutory language is ambiguous and the intent of the enacting body is in doubt, however; it cannot be invoked when, as here, the meaning of the statutory language is not otherwise uncertain. [Citations.]” (*Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 64; see *Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 237-238 [liberal construction cannot overcome the plain language of a proposition].)

We do recognize that the analysis of Proposition 47 by the Legislative Analyst discussed the reduction of existing penalties and, with respect to check forgery, stated: “Under current law, it is a wobbler crime to forge a check of any amount. Under this measure, forging a check worth \$950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft in connection with forging a check.” (Voter Information Guide, Gen. Elec., *supra*, Analysis of Prop. 47 by the Legislative Analyst, p. 35.) It is hard to fathom the basis for, or the meaning of, the Legislative Analyst’s “in connection with” comment. The remaining text of Proposition 47 and the other ballot materials say nothing about the identity theft exception to subdivision (b) of section 473. In any case, we remain faithful to the settled principle that “[o]nly when the statute’s language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.)” (*Murphy, supra*, 40

Cal.4th at p. 1103; see *People v. Mentch* (2008) 45 Cal.4th 274, 282-283 [“If the text is ambiguous and supports multiple interpretations, we may then turn to extrinsic sources such as ballot summaries and arguments for insight into the voters’ intent. [Citations.]”].)

“ ‘ “Where the statute is clear, courts will not ‘interpret away clear language in favor of an ambiguity that does not exist.’ [Citation.]” ’ [Citation.]” (*People v. Loeun* (1997) 17 Cal.4th 1, 9.) “When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citations.]” (*People v. Overstreet* (1986) 42 Cal.3d 891, 895; see *Ratzlaf v. United States* (1994) 510 U.S. 135, 147-148 [“we do not resort to legislative history to cloud a statutory text that is clear”].) As indicated, “[w]e may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.” (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

Lastly, defendant urges us to apply the rule of lenity and construe the identity theft exception as applying “only to identity theft offenses that have a transactional relationship with the forgery at issue.” “Under that principle [of lenity], when ‘two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute’s ambiguities in a convincing manner is impracticable,’ we construe the provision most favorably to the defendant. (*People v. Jones* (1988) 46 Cal.3d 585, 599.)” (*People v. Athar* (2005) 36 Cal.4th 396, 404.)

The rule of lenity does not apply here. “ ‘The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.’ [Citation.]” (*People v. Avery* (2002) 27 Cal.4th 49, 58.) “[A]lthough true ambiguities are resolved in a defendant’s favor, an appellate court should not strain to interpret a penal statute in defendant’s favor if it can fairly discern a contrary legislative intent.” (*Ibid.*) In addition, “the doctrine that ambiguity or uncertainty in a criminal statute must be construed in favor of the defendant is only an aid to construction and cannot be invoked until the

statute is shown to be ambiguous or uncertain as applied to the particular defendant. (See *Callanan v. United States* (1961), 364 U.S. 587, 596.)” (*People v. Alday* (1973) 10 Cal.3d 392, 395.)

B. Counsel’s Failure to Argue that Count 4 was a Misdemeanor

Defendant argues that defense counsel provided ineffective assistance by failing to argue that Proposition 47 reduced count four to a misdemeanor. A defense counsel’s “failure to make a meritless objection does not constitute deficient performance.” (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1080.) Moreover, since defendant cannot demonstrate any prejudice, his ineffective assistance of counsel claim must be rejected. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694, 697, 700; see *Harrington v. Richter* (2011) 562 U.S. 86, 105, 111-112.)

C. Alleged Instructional Errors Related to Count Two

1. Background

In the court below, defense counsel objected to the court’s giving CALCRIM No. 376 (Possession of Recently Stolen Property as Evidence of a Crime) on the ground that it “seem[ed] to be circular in that . . . if you believe he had possessed stolen property, then it relate[d] to Count Two” and that involved “a piggybacking or circular argument.” She did not object on due process grounds or on the ground that the instruction allowed jurors to draw an unconstitutional permissive inference.

The trial court gave a modified CALCRIM No. 376 instruction: “If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of Count Two, possession of stolen property, based on those facts alone. [¶] However, if you also find that supporting evidence tends to prove his guilt, then you *may* conclude that the evidence is sufficient to prove he committed possession of stolen property. [¶] The supporting evidence need only be slight. It need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, whether the property was

modified or altered, along with any other relevant circumstances tending to prove his guilt of Count Two, possession of stolen property. [¶] *Remember that you may not convict defendant of any crime unless you are convinced that each fact essential to the conclusion that defendant is guilty of the crime has been proved beyond a reasonable doubt.*” (Italics added.)

The trial court instructed the jury on count 2 pursuant to CALCRIM No. 1750, modified as follows: “The defendant is charged in Count Two with receiving, concealing or withholding stolen property in violation of Penal Code section 496(a). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] One. The defendant received, concealed or withheld from its owner, or aided and abetted in concealing or withholding from its owner property that had been stolen. [¶] Two. When the defendant received, concealed or withheld from its owner, or aided in concealing or withholding from its owner property, he knew that the property had been stolen. [¶] And three. [T]he defendant actually knew of the presence of the property. [¶] Property is stolen if it was obtained by any type of theft. Theft includes obtaining property by larceny or misappropriation of [lost] property. [¶] You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one stolen item and you agree on which stolen item he possessed.”

2. Instruction Pursuant to CALCRIM No. 376

Defendant argues that his state and federal rights to due process were violated by the trial court’s instruction pursuant to CALCRIM No. 376 and that the instruction impermissibly dilutes the reasonable doubt standard by telling the jury that “it only needed ‘slight’ supporting evidence to find the knowledge element of possession of stolen property proven beyond a reasonable doubt.”

“A long line of authority, culminating in *People v. McFarland* (1962) 58 Cal.2d 748, establishes that proof of knowing possession by a defendant of recently stolen property raises a strong inference of the other element of the crime: the defendant’s

knowledge of the tainted nature of the property. This inference is so substantial that only ‘slight’ additional corroborating evidence need be adduced in order to permit a finding of guilty. (*Id.* at p. 754.)” (*People v. Anderson* (1989) 210 Cal.App.3d 414, 421.) In *People v. McFarland*, the California Supreme Court explained: “Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citations.] This court stated in *People v. Lyons*, 50 Cal.2d 245, 258[:] ‘[P]ossession of stolen property, accompanied by no explanation or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. The rule is generally applied where the accused is found in possession of the articles soon after they were stolen.’ [Citations.]” (*McFarland, supra*, at p. 754.)

The substance of CALCRIM No. 376 was approved in *People v. Gamache* (2010) 48 Cal.4th 347 (*Gamache*), which considered CALJIC No. 2.15, an analogous standard instruction. In that case, the California Supreme Court stated: “CALJIC No. 2.15 is an instruction generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.] In the presence of at least some corroborating evidence, it permits—but does not require—jurors to infer from possession of stolen property guilt of a related offense such as robbery or burglary. We have held the instruction satisfies the due process requirement for permissive inferences, at least for theft-related offenses: the conclusion it suggests is ‘ “one that reason and common sense justify in light of the proven facts before the jury.” ’ [Citations.]” (*Gamache, supra*, at p. 375.)

In *People v. Seumanu* (2015) 61 Cal.4th 1293 (*Seumanu*), the defendant contended that CALJIC No. 2.15 “violated his constitutional rights by establishing a ‘permissive inference of guilt based on evidence of conscious possession of recently stolen property’ and, because the rule provides that only slight corroboration is thereafter needed, it

dilutes the ‘ineluctable rule that a criminal conviction may be predicated *only* on proof beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.)’ ” (*Seumanu, supra*, at p. 1350.) The California Supreme Court rejected that argument: “We have also previously addressed and rejected defendant’s reasonable doubt argument, holding CALJIC No. 2.15 ‘does not establish an unconstitutional mandatory presumption in favor of guilt [citation] or otherwise shift or lower the prosecution’s burden of establishing guilt beyond a reasonable doubt [citations].’ (*People v. Gamache, supra*, 48 Cal.4th at p. 376.) Further, ‘nothing in the instruction . . . relieves the prosecution of its burden to establish guilt beyond a reasonable doubt.’ [Citations.] Because defendant advances no persuasive reason why our previous authority addressing this issue was in error, we adhere to them now and reject the claim that CALJIC No. 2.15 violated his constitutional rights” (*Id.* at p. 1351.)

The United States Supreme Court has generally permitted instruction concerning a permissive inference, “which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. [Citation.]” (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) The court stated: “In that situation the basic fact may constitute prima facie evidence of the elemental fact. [Citations.] When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. [Citation.] Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the ‘beyond a reasonable doubt’ standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.” (*Ibid.*)

“A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.” (*Francis v. Franklin* (1985) 471 U.S. 307, 314.) “A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury

that the suggested conclusion should be inferred based on the predicate facts proved.” (*Ibid.*) “A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]” (*Id.* at pp. 314-315; *People v. Goldsmith* (2014) 59 Cal.4th 258, 270 [“Permissive inferences violate due process only if the permissive inference is irrational. [Citations.]”].)

Defendant has failed to demonstrate that the permissive inference that he was guilty of the crime charged in count 2 (§ 496, subd. (a)) was irrational in this case, or that the court’s instruction concerning the permissive inference reduced the prosecution’s burden of proof. He acknowledges that the evidence showed that he was in “possession of other contraband items” in addition to the stolen STMS check and that he had been in “possession of contraband items” on two prior occasions. As indicated, the evidence showed that defendant possessed multiple checks not belonging to him, including a stolen STMS check made out to and endorsed by him, a state benefits card and driver’s license that did not belong to him, and a counterfeit \$50 bill. On prior occasions, he had been found in possession of social security cards belonging to other persons and multiple counterfeit bills. Based on the facts of this case, the permissive inference permitted under the court’s instruction was rational.

Moreover, the challenged instruction specifically reminded the jurors that they “may not convict defendant of any crime unless [they] are convinced that each fact essential to the conclusion that defendant is guilty of the crime has been proved beyond a reasonable doubt.” The court gave extensive instructions on the presumption of innocence and the People’s burden to prove defendant guilty beyond a reasonable doubt.

Defendant points out that a number of federal courts of appeals have reversed convictions where a trial court instructed a jury that “ ‘[o]nce the existence of the agreement or common scheme of conspiracy is shown, . . . slight evidence is all that is required to connect a particular defendant to the conspiracy.’ ” (*United States v. Partin*

(5th Cir. 1977) 552 F.2d 621, 628⁵ (*Partin*), italics omitted; see *United States v. Durrive* (7th Cir. 1990) 902 F.2d 1221, 1228 [“[W]hen the sufficiency of the evidence to connect a particular defendant to a conspiracy is challenged on appeal, ‘substantial evidence’ should be the test rather than ‘slight evidence’ or ‘slight connection.’ [fn. omitted]”]; *United States v. Dunn* (9th Cir.1977) 564 F.2d 348, 356-357 [restating the “slight evidence” rule to clarify that defendant’s connection to the conspiracy need only be slight, but the connection must be proved beyond a reasonable doubt].) These cases do not convince us that the “slight evidence” instruction being challenged in this case unconstitutionally reduced the People’s burden of proof.

The “slight evidence” instruction in criminal conspiracy cases, which some federal courts have denounced, permitted juries to find that a defendant was a participant in a criminal conspiracy based on “slight evidence.” The “slight evidence” instruction at issue here is distinguishable because it permits the jury to draw a permissive inference of guilt in a theft-related case from the evidence of predicate facts (knowing possession of

⁵ The Fifth Circuit Court of Appeals has consistently condemned the giving of a “slight evidence” instruction regarding a defendant’s connection to a criminal conspiracy. (See e.g. *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500 [“The ‘slight evidence’ reference can only be seen as suffocating the ‘reasonable doubt’ reference.”]; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256 [“erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing jury members that a defendant’s participation in the conspiracy need not be proved beyond a reasonable doubt” (fn. omitted)]; *Partin, supra*, 552 F.2d at p. 628 [appellate court bound by precedent to reverse]; *United States v. Marionneaux* (5th Cir. 1975) 514 F.2d 1244, 1249 [following *Brasseaux*]; *United States v. Brasseaux* (5th Cir.1975) 509 F.2d 157, 162 [Two possible dangers inherent in the “slight evidence” instruction: “First, the jury might be led to conclude that a defendant’s participation in the alleged conspiracy need not be proved beyond a reasonable doubt. Second, they might simply become confused regarding the proper standard for linking a defendant to a conspiracy”; but court affirmed judgment because defendant failed to object below and court reiterated in several places in its instructional charge that each element of the offense must be proved beyond a reasonable doubt].)

property proved to be recently stolen and at least slight, additional supporting evidence of guilt), provided the People have proved every fact essential to a guilty verdict beyond a reasonable doubt.

In light of the entirety of the charge (see *People v. Salazar* (2016) 63 Cal.4th 214), the court's instruction pursuant to CALCRIM No. 376 did not violate due process by allowing the jury to draw an unconstitutional permissive inference or by unconstitutionally lowering the prosecution's burden of proof. (Cf. *People v. Moore* (2011) 51 Cal.4th 1104, 1130-1133; *Gamache, supra*, 48 Cal.4th at pp. 374-376.)

3. Instruction Pursuant to CALCRIM No. 1750

Defendant argues that the court's instruction pursuant to CALCRIM No. 1750 violated his constitutional right to due process of law by failing to define "aiding and abetting." Defendant contends that the trial court had a sua sponte duty to instruct on the meaning of that phrase because there was substantial evidence of aiding and abetting and that the trial court should have given CALCRIM Nos. 400 (Aiding and Abetting: General Principles) and 401 (Aiding and Abetting: Intended Crimes).⁶ Defendant claims that "substantial evidence showed that persons other than [he] may have been direct principals in the theft and/or possession of the stolen STMS checks." He asserts that this court must reverse the conviction for violating section 496, subdivision (a), because the People cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Under section 496, subdivision (a), "[e]very person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or

⁶ "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

extortion, knowing the property to be so stolen or obtained, or *who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained*” (italics added) commits a crime. We assume for purposes of this appeal that a person is guilty of violating section 496 by aiding “in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained” only if the person is liable as an aider and abettor and that a trial court is required to instruct on each element of aiding and abetting. We nevertheless conclude that any error by the trial court in failing to give an aiding and abetting instruction was harmless.

According to defendant’s testimony at trial, he endorsed the STMS check for \$400, which was made out to him, after his daughter (who exercised her Fifth Amendment right against self-incrimination when called as witness at trial by defendant) showed him the check, indicated that she had received it from an assistance group that was helping her to cover her bills, and she told him that she needed to pay her bills. Defendant claimed that he intended to have the STMS check deposited into his bank account and to then allow his daughter to withdraw \$400 from his account. Defendant’s account did not establish that he was merely aiding his daughter’s commission of the crime of concealing or withholding stolen property.

The stolen STMS check was found in defendant’s wallet, which he was carrying, on February 12, 2014. That check appeared to have been made payable to defendant, he endorsed it, and he planned on depositing it into his own bank account. All evidence pointed to defendant’s guilt as a direct perpetrator. The evidence that multiple STMS checks had been taken from the vehicle of the society’s treasurer and the evidence that, after the stolen STMS check was found in defendant’s possession, there had been attempts to cash two different STMS checks did not support an inference that defendant was merely aiding his daughter or some other unknown direct perpetrator in the concealing or withholding of the stolen STMS check found in his wallet.

Even though the court's instruction suggested that defendant could be found guilty of violating section 496, subdivision (a), if he aided and abetted in concealing or withholding stolen property from its owner, the prosecutor did not rely on an aiding and abetting theory. Further, the court specifically told the jury: "Some of these instructions may not apply depending on your findings about the facts of the case. Don't assume that just because I give a particular instruction, I am suggesting anything about the facts. [¶] After you have decided what the facts are, then follow the instructions that do apply to the facts as you find them." Under the instructions given, the jury necessarily found that defendant knew that the property (a check) had been stolen and he knew of its presence. Based on the evidence, the jury could not have rationally found that defendant was not guilty as a direct perpetrator but was guilty as an aider and abettor. The error, if any, in failing to specifically instruct on aiding and abetting was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; see *Neder v. United States* (1999) 527 U.S. 1, 8-16 [instruction that omits element of offense is subject to harmless error analysis under *Chapman*]; *People v. Dyer* (1988) 45 Cal.3d 26, 64 [the *Chapman* standard of review applies to *Beeman* error].)

DISPOSITION

The judgment is affirmed.

ELIA, J.

WE CONCUR:

PREMO, ACTING P.J.

MIHARA, J.